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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1964

No. 590

HENRY R. AHLERS, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Henry R. Ahlers prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Second Circuit, entered September 1, 1964, affirming orders below adjudicating him in contempt and committing him until he should purge himself of contempt.

### OPINION BELOW

The opinion of the Court of Appeals for the Second Circuit, reported in 57 LRRM 2051, is included in Appendix B hereto, *infra* p. 7a.

## JURISDICTION

The judgments of the Court of Appeals, entered September 1, 1964 (R. II-132a-135a), are included in Appendix B hereto, *infra*, pp. 9a-10a. The time for filing this petition was extended by order of Mr. Justice Harlan on September 21, 1964, to and including October 31, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## QUESTIONS PRESENTED

1. Whether § 601 of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 521, by virtue of its incorporation of certain provisions of 15 U.S.C. §§ 49 and 50, provides immunity against prosecution, so that a witness subpoenaed thereunder to testify at an administrative hearing may be required to answer questions, under pain of contempt, despite proper assertion of his privilege against self-incrimination.

2. Whether, assuming there is such a provision for immunity, the statutory machinery may lawfully be employed as a mere auxiliary to a prosecutive investigation before a grand jury for the purpose of compelling testimony unsuccessfully sought and not compellable by the grand jury.

3. Whether, after disobeying a court order that he answer the questions or, upon refusal to answer them, be brought before the court for such action as the court might deem proper, the witness may, within the requirements of due process, be adjudicated in contempt without notice or hearing and on the sole basis of an apparently hearsay affidavit.

## STATUTES INVOLVED

The statutory provisions involved are §§ 601, 604 and 607 of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 539, 540 (1959), 29 U.S.C. §§ 521, 524 and 527 (1962 Supp.); and §§ 9 and 10 of the Federal Trade Commission Act of 1914, 38 Stat. 722-23 (1914), 15 U.S.C. §§ 49 and 50 (1958). They are printed in Appendix A, *infra*, p. 1a et seq.

## STATEMENT

In the spring of 1964, petitioner, subpoenaed by a federal grand jury in the Southern District of New York in connection with its investigation into "alleged labor racketeering on the part of various officials of Local 32 E of the Building Service Employees' International Union," relied on his privilege against self-incrimination and declined to answer questions. R. I-32a, II-49a.

Thereafter, on May 4, 1964, Assistant United States Attorney Andrew J. Maloney, who had been conducting the grand jury investigation, procured the issuance of a Department of Labor subpoena requiring petitioner to appear before a Compliance Officer to testify in an investigation of possible violations of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 29 U.S.C. § 401 et seq. (1962 Supp.) (hereinafter called "the Landrum-Griffin Act"). R. I-32a, II-33a, 49a.[1] Petitioner appeared before the Compliance Officer on May 8, 1964, and was asked whether he had made "any pay-offs or payments of any kind to

[1] Opposing a motion for stay pending appeal, Mr. Maloney said in an affidavit that delay in enforcing the Labor Department subpoena would thwart the government's "criminal investigation." R. II-51a; see also R. II-79a, 142a.

any officer or official of Local 32 E. . . ." On petitioner's statement that he wished to consult an attorney before answering any questions, the inquiry was postponed until May 11, 1964, petitioner being directed to appear again at that time. R. I-9a-10a. Petitioner did so appear and invoked his privilege against self-incrimination. He persisted in declining to answer questions despite the Compliance Officer's reference to the statutory immunity "which I as a representative of the United States Department of Labor have granted you. . . ." R. I-11a-13a. Petitioner was then directed to appear again on May 14, 1964, at which time, when he again invoked his constitutional privilege, the Compliance Officer informed him that he was subject to "criminal sanctions" and that he could be "indicted for contempt under Title 15, Section 50 of the United States Code. . . ." The Officer also read to petitioner the language of that statute that a recalcitrant witness "shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine and/or imprisonment." R. I-14a-18a. Assistant United States Attorney Maloney was present at each of petitioner's appearances before the Compliance Officer. R. I-8a, 11a, 14a.

The Labor Department, having carried out the assignment given it by Mr. Maloney, then referred its subpoena to the United States Attorney for "appropriate action to secure compliance. . . ." R. I-5a. Mr. Maloney obtained an order requiring petitioner to show cause why he should not be ordered to answer the questions and why, if he failed to answer them, he should not be punished for contempt. R. I-2a. After hearing on the order to show cause, the court (Tyler, J.) on July 9, 1964, ordered petitioner to appear before

the Compliance Officer on July 16, 1964, and answer the questions. The court further ordered that, if petitioner did not obey the order, the United States Attorney "may move ex parte for a Writ of Attachment to the United States Marshal . . . directing that [petitioner] be arrested and brought forthwith before a Judge of this Court for such action to enforce compliance with said subpoena as to this Court shall seem just and proper in the premises." R. I-21a.

In obedience to this order, petitioner appeared before the Compliance Officer on July 16, 1964, but again invoked his privilege. R. II-14a, 27a-30a. Thereupon, pursuant to the July 9 order, Assistant United States Attorney Maloney filed an *ex parte* affidavit praying for a writ of attachment. R. II-5a. The Court, acting upon the affidavit, signed its order of July 16, 1964 (entered July 17, 1964), not only directing issuance of the writ of attachment, but also declaring that petitioner "be and he hereby is adjudged in contempt." The order, like the affidavit, was *ex parte*. R. II-3a.

On July 20, 1964, petitioner, having surrendered to the marshal, was brought before the court (Palmieri, J.) pursuant to the July 17 order "adjudging [petitioner] in contempt. . . ." R. II-32a. Mr. Maloney stated that his purpose in bringing petitioner before the court was to offer him another chance to answer the questions. R. II-35a. Petitioner's counsel, when asked by the court whether petitioner was ready to answer the questions pointed out that the contempt adjudication had been *ex parte* and asked for a hearing on the contempt issue. R. II-35a-36a. The court replied:

> "Your request is denied. I again ask you, is your client prepared to answer relevant questions

> by the compliance officer of the Labor Department? That is the only question I want you to answer." R. II-36a.

Further, the court stated:

> "As I understand this matter there is nothing left for me to do except to see that a proper order of contempt is prepared. That is all . . . ." R. II-37a.

When counsel for petitioner said he could not tell whether the adjudication was for civil or criminal contempt, the court stated:

> "I will take the responsibility for telling you now it is a civil contempt, and it has been conducted as a civil contempt proceeding by the Government, and a proper order should be before me, and which I direct the United States Attorney to prepare forthwith which must provide that this person Henry R. Ahlers should by pursuing certain condr ct have the right to unlock the key to the jail do r.
>
> "In other words, the capacity to purge himself must be spelled out so that there will be no question. Two things:
>
> "First, why he has been held in contempt and why he has been arrested and incarcerated, and secondly how he gets himself out of jail.
>
> "Now, with that in his hands it is easy to contemplate that there is nothing for me to do except to order his incarceration." R. II-38a.

Judge Palmieri then entered an order, the same day, committing petitioner to the Federal Detention Headquarters until he should purge himself of contempt. R. II-10a. The order, while purporting to adjudicate the contempt in addition to committing petitioner, re-

cites that petitioner had already been adjudicated in contempt by Judge Tyler's order entered July 17, 1964.

Petitioner took timely appeals to the court below from (1) Judge Tyler's order of July 9, 1964, directing him to answer the questions and authorizing application for a writ of attachment should he refuse; (2) Judge Tyler's *ex parte* order of July 17, 1964, directing issuance of the writ of attachment and adjudicating petitioner in contempt; and (3) Judge Palmieri's commitment order of July 20, 1964. R. I-23a; R. II-9a, 46a. All the orders were affirmed on September 1, 1964. R. II-29a. Petitioner's motion below for a stay of mandate pending this petition was denied on September 29, 1964. R. II-145a, 147a. An application for stay was thereupon filed in this Court on September 30, 1964, but has not yet been decided.

## REASONS FOR GRANTING THE WRIT

1. The Landrum-Griffin Act, despite the holding below and the indication of several other lower court decisions,[2] provides no immunity against prosecution. The section in question, Act of September 14, 1959, Title VI, § 601(b), 73 Stat. 539, 29 U.S.C. § 521(b) (1962 Supp.) [hereinafter cited as § 521(b)], is substantially identical to the provisions of two other labor acts: 52 Stat. 1065 (1938), 29 U.S.C. § 209 (1958)

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[2] What the court below held in this case was assumed, without any apparent contest, in three other reported cases: *Goldberg* v. *Battles*, 196 F. Supp. 749 (E.D. Pa. 1961), *aff'd*, 299 F. 2d 937 (3rd Cir.), *cert. denied*, 371 U.S. 817; *Local 57, International Union of Operating Engineers* v. *Wirtz*, 326 F. 2d 467 (1st Cir. 1964); *In re Certain Grand Jury Witnesses*, 211 F. Supp. 365 (E.D. Mich. 1962). See also *Wirtz* v. *Maltes*, D. Puerto Rico, Civil Action No. 307-63, August 15, 1963 (unreported).

(The Fair Labor Standards Act); and 61 Stat. 155 (1947), 29 U.S.C. § 177 (1958) (investigations by President's emergency boards of inquiry). Petitioner contends that none of the three provides for immunity against prosecution. All three provide:

> ". . . the provisions of sections 49 and 50 of Title 15 *(relating to the attendance of witnesses and the production of books, papers, and documents)*, are made applicable *to the jurisdiction, powers, and duties of the* [*administrator of the act*]." Emphasis supplied.

Petitioner contends that the effect of the two underscored clauses is to limit the incorporation of the Federal Trade Commission Act, 15 U.S.C. §§ 49 and 50, to so much of that act's provisions as confers investigative power upon the administrator, omitting the provision for immunity against prosecution. Section 49 [3] of Title 15, referred to in 29 U.S.C. § 521(b), provides, in its first six paragraphs, a complex scheme for acquisition of information, including access to corporate documents, power to subpoena witnesses and documentary evidence, power to hold hearings anywhere in the United States, right to invoke judicial aid in enforcing subpoenas, procedure for taking of depositions, and payment of witness fees and mileage. Those are the provisions incorporated into the Landrum-Griffin Act by the carefully circumscribed language of § 521(b). The immunity provision, contained in the final paragraph of 15 U.S.C. § 49, is clearly omitted by the same circumscribed language.

Had Congress intended Landrum-Griffin to contain an immunity provision, it would not have employed such restrictive language. It would either have spelled

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[3] Section 50 defines offenses and penalties for refusal to appear and produce documents as required by § 49.

out an immunity grant as it has done in the vast majority of immunity statutes,[4] or, if it chose to accom-

[4] 24 Stat. 382 (1887), 49 U.S.C. § 9 (1958) (Interstate Commerce Act, private suits); 27 Stat. 443 (1893), 32 Stat. 904 (1903), 34 Stat. 798 (1906), 49 U.S.C. §§ 46-48 (1958) (Interstate Commerce Act [Compulsory Testimony Act of 1893]); 30 Stat. 548 (1898), 11 U.S.C. § 25(a) (10) (1958) (bankruptcy proceedings); 32 Stat. 848 (1903), 49 U.S.C. § 43 (1958) (Elkins Act); 32 Stat. 904 (1903), 34 Stat. 798 (1906), 15 U.S.C. §§ 32, 33 (1958) (antitrust laws); 38 Stat. 722 (1914), 15 U.S.C. § 49 (1958) (Federal Trade Commission Act); 39 Stat. 737 (1916), 46 U.S.C. § 827 (1958) (Shipping Act); 42 Stat. 853 (1922), 15 U.S.C. § 155(c) (1958) (China Trade Act); 46 Stat. 536 (1930), 7 U.S.C. § 499m(f) (1958) (Perishable Agricultural Commodities Act); 46 Stat. 699 (1930), 19 U.S.C. § 1333(e) (1958) (Tariff Commission); 48 Stat. 86 (1933), 15 U.S.C. § 77v(c) (1958) (Securities Act); 48 Stat. 899 (1934), 15 U.S.C. § 77u(d) (1958) (Securities Exchange Act); 48 Stat. 1096 (1934), 47 U.S.C. § 409 (1) (1958) (Communications Act); 49 Stat. 449 (1935), 29 U.S.C. § 161 (3) (1958) (Labor Management Relations Act); 49 Stat. 624 (1935), 42 U.S.C. § 405 (f) (1958) (Social Security Act); 49 Stat. 831 (1935), 15 U.S.C. § 77 r(e) (1958) (Public Utilities Holding Company Act); 49 Stat. 856 (1935), 16 U.S.C. § 825f(g) (1958) (Federal Power Commission, regulation of public utilities); 49 Stat. 1991 (1936), 46 U.S.C. § 1124 (c) (1958) (Merchant Marine Act); 52 Stat. 838 (1938), 15 U.S.C. § 717 m(h) (1958) (Federal Power Commission, regulation of natural gas); 52 Stat. 1107 (1938), 45 U.S.C. § 362 (c) (1958) (Railroad Unemployment Insurance Act); 54 Stat. 676 (1940), 50 U.S.C. App. § 1152(a) (1958) (national defense contract investigations); 54 Stat. 842 (1940), 15 U.S.C. § 80a-41(d) (1958) (Investment Companies Act); 54 Stat. 853 (1940), 15 U.S.C. § 80b-9(d) (1958) (Investment Advisors Act); 56 Stat. 185 (1942), 50 U.S.C. App. § 643(a) (1958) (war contractors investigations); 64 Stat. 816 (1950), 50 U.S.C. App. § 2155(b) (1958) (Defense Production Act); 64 Stat. 882 (1950), 12 U.S.C. § 1820 (d) (1958) (Federal Deposit Insurance Corporation); 68A Stat. 586, 793 (1954), 26 U.S.C. §§ 4874, 7493 (1958) (cotton futures taxes); 72 Stat. 792 (1958), 49 U.S.C. § 1484(i) (1958) (Aviation Act); 18 U.S.C. § 1406 (1962 Supp.) (narcotics); 18 U.S.C. § 2424(b) (1958) (White Slave Trade Act); 18 U.S.C. § 3486 (1958) (internal security).

plish its end by incorporating the immunity provision of another statute, it would have done so, as it has so often before, in unmistakable terms.

If Congress were incorporating the immunity provision of the Federal Trade Commission Act, it would have used the type of language employed in the Packers and Stockyards Act, 42 Stat. 168 (1921), 7 U.S.C. § 222 (1958):

> ". . . *the provisions* . . . of sections . . . 48-50 of Title 15, are made applicable to the jurisdiction, powers and duties of the Secretary . . . *and to any person subject to the provisions of this chapter* . . ." Emphasis supplied.

An identical form of incorporation of 15 U.S.C. § 49 was employed in the Federal Alcohol Administration Act, 49 Stat. 977 (1935), 27 U.S.C. § 202 (c) (1958). In both cases, there was no such parenthetical restriction of the incorporation to *investigative provisions* as is found in the instant statute. In both cases, moreover, the incorporation was made to extend not only to the jurisdiction, powers and duties of the administrator of the act, but also to the *persons governed by the act.*

The immunity provision most frequently adopted by incorporation is the Compulsory Immunity Act of 1893, 27 Stat. 443 (1893), 49 U.S.C. § 46 (1958). Eight statutes incorporate this immunity provision and in all eight the intent to grant immunity is clear and unmistakable. See, for example, 18 U.S.C. § 835(b) (1962 Supp.), covering Interstate Commerce Commission investigations relating to explosives:

> ". . . the immunity provisions of the Compulsory Testimony Act of February 11, 1893 . . . shall apply with respect to any individual who specifically claims such privilege . . ."

Identical language was used in 68 Stat. 948 (1954), 42 U.S.C. § 2201 (c) (1958) (Atomic Energy Act); 61 Stat. 199 (1947) 50 U.S.C. App. § 1896(f) (6) (1958) (rent control); and 63 Stat. 8 (1949), 50 U.S.C. App. § 2026(b) (1958) (Export Control Act). See also the Commodity Exchange Act, 49 Stat. 1499 (1936), 7 U.S.C. § 15 (1958):

> "... the provisions including penalties of sections ... 46-48 of Title 49 ... relating to the attendance and testimony of witnesses, the production of documentary evidence, and the immunity of witnesses, are made applicable to the power, jurisdiction, and authority of the Secretary of Agriculture ... and to any person subject [to the provisions of this chapter]."

And see the Motor Carriers Act, 49 Stat. 548 (1935), 49 U.S.C. § 305(d) (1958):

> "... any person subpoenaed or testifying in connection with any matter under investigation under this chapter shall have the same rights, privileges and immunities and be subject to the same duties, liabilities, and penalties as though such matter arose under chapter 1 of this title ..."

The remaining two statutes incorporating the Compulsory Testimony Act, while not specifically referring to immunity, effect clear and unrestricted incorporation of the immunity provision. See the Water Carriers Act, 54 Stat. 946 (1940), 49 U.S.C. § 916(a) (1958):

> "*The provisions* of sections ... 46-48 of this Title shall apply with full force and effect in the administration and enforcement of this chapter." Emphasis supplied.

An identical incorporation is made by the Freight Forwarders Act, 56 Stat. 297 (1942), 49 U.S.C. § 1017(a) (1958).[5]

Of all the statutes incorporating any provisions of either 15 U.S.C. § 49 or 49 U.S.C. § 46, there are only three which (1) omit a specific reference to immunity, (2) omit from the incorporation the testimony of witnesses, as distinguished from their attendance, and (3) restrict the application of the incorporation to the "jurisdiction powers and duties" of the administrator, as distinguished from any effect upon the persons embraced within the administration of the statute. The first of these three, as we have stated, is the Fair Labor Standards Act, 29 U.S.C. § 209. The second is a provision of the Labor-Management Relations Act of 1947 dealing with investigations by special presidential emergency boards of inquiry in labor disputes affecting the national interest, 29 U.S.C. § 177(c), obviously copied from the first. The third is the instant statute, 29 U.S.C. § 521(b), which was avowedly [6] taken from the Fair Labor Standards Act. No cases have been found referring to the first two as granting immunity. Nor has any evidence come to light that they were treated by their administrators as providing any immunity. Indeed, the legislative history of the Fair Labor Standards Act indicates, so far as legislative history can indicate, that Congress, by consciously dropping from the act a specific immunity provision which had been in the bill as introduced, elected to

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[5] The Freight Forwarders Act incorporates, additionally, the immunity provisions of the antitrust laws, 15 U.S.C. §§ 32, 33.

[6] See p. 15, *infra*.

provide no immunity.[7] So far as concerns 29 U.S.C. § 177(c), it is submitted that one need but compare it with the clear and specific immunity provision applying to National Labor Relations Board investigations, 49 Stat. 449 (1935), 29 U.S.C. § 161(3) (1958), to conclude that Congress, in amending the National Labor Relations Act in 1947 by giving the President the power to use special boards of inquiry to settle strike emergencies, intended by § 177(c) merely to give those boards investigative power, but had neither reason nor intent to confer any immunity upon persons called on to provide information. The language of both § 209 and § 177(c) of Title 29 is plain. They grant subpoena power, but create no immunity. The same is true of the identical language in § 521(b). Petitioner submits that the holding below, as well as the other lower court opinions treating § 521(b) as providing immunity, misread the plain language of the statute.

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[7] The bill as first passed in the Senate, S. 2475, 75th Cong., 1st Sess. (1937), provided in § 11: "No person shall be excused from testifying . . . on the ground that the testimony may tend to incriminate him . . . but no individual shall be prosecuted or subject to any penalty or forfeiture . . . after having claimed his privilege against self-incrimination." The House then passed the bill in its present form. H.R. 2182, 75th Cong., 3rd Sess. (1938). The conference committee accepted the House version.

There is much to say for Mr. Justice Frankfurter's view in his dissent in *United States* v. *Monia*, 317 U.S. 424, 445-46, that Congress would not have been likely to substitute an automatic immunity provision for the more modern form spelled out in the Senate bill. It is respectfully submitted, however, that the conclusion that Congress chose to drop immunity from the statute is more reasonable than Mr. Justice Frankfurter's suggestion that Congress was merely substituting language which did not express its intent for language which did.

But even if the Court should find in § 521(b) sufficient ambiguity to warrant reference to the legislative history, the conclusion that no immunity was provided would be fortified. The section was part of the bill as first introduced in the Senate and remained unchanged through various versions of the bill, until final adoption.[8] Neither the Senate nor the House committee report contained even a suggestion that the language was intended as an immunity provision. The purpose of the section, according to the Senate report, was to give the Secretary of Labor the power to "make investigations, armed with subpoena power—the same subpoena powers that are vested in the Federal Trade Commission Act." S. Rep. No. 187, 86th Cong., 1st Sess., April 14, 1959, pp. 34, 52. Similarly, the House report explained the provision as giving the Secretary "investigative power, including the power of subpoena . . ." H. Rep. No. 741, 86th Cong., 1st Sess., July 30, 1959, p. 2. If the House committee had wished to provide for immunity, it had before it the perfectly unambiguous immunity provision of the National Labor Relations Act [29 U.S.C. § 161(3)] which it set forth in full in its report. *Id.* at 70. When the different versions of the legislation went to conference, neither the House nor the Senate conferees treated the language here in question as providing anything more than subpoena powers. H. Rep. No. 1147, 86th Cong., 1st Sess., Sept. 3, 1959, p. 36; *Section By Section Analysis of the Labor Management Reporting and Disclosure Act of 1959,* prepared for the use of the Senate Committee on Labor and Public Welfare, 86th Cong., 1st Sess., Sept. 10, 1959, p. 17.

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[8] See, all in 86th Cong., 1st Sess: S. 505, § 503; S. 1555, as reported by committee, § 503; S. 1555, as passed by Senate, § 604; H.R. 8400, § 601(b); H.R. 8342, § 601(b).

Further light is cast on § 521(b) by the legislative history of the unsuccessful attempt to legislate in this area in the previous Congress. The first bill introduced in 1958 by then Senator Kennedy gave the Secretary investigative but not subpoena power. Since the Secretary deemed the bill inadequate in that respect, Senator Kennedy agreed to accept an amendment offered by Senator Cooper inserting the language which now constitutes § 521(b).

Senator Kennedy said:

> "The Secretary of Labor feels that the powers the bill will give him, which are the same he has under the Fair Labor Standards Act, to investigate, enter, inspect, and so forth are insufficient. Therefore, the Senator from Kentucky [Mr. Cooper] proposes to submit an amendment which will provide that the Secretary of Labor shall be given the same powers—relating to the attendance of witnesses and the production of books, papers, and documents—that are provided by the Federal Trade Commission Act of 1914, as amended. We shall accept that amendment." *Legislative History of the Labor Management Reporting and Disclosure Act of 1959, Titles I-VI,* U.S. Department of Labor, p. 1092.

Senator Cooper characterized his amendment as giving the Secretary "the full subpoena powers that are granted the Federal Trade Commission, and which is [sic] also granted to the Administrator of the Wage and Hour Division, under the Fair Labor Standards Act." *Id.* at 1093. In accepting the amendment, Senator Kennedy said:

> "The third criticism made by the Secretary was:
>
> > 'The enforcement of the reporting requirements . . . would be almost impossible to per-

> form inasmuch as the bill does not provide subpoena powers.'
>
> "It is true that the bill does not contain broad subpoena powers permitting the Secretary to seize records peremptorily.
>
> "This subject was dealt with in an amendment this morning. I think it is true that the bill contains plenary power in sections 105 and 106(b) and (c) to investigate, enter premises, inspect records, issue regulations, and so forth—all powers designed more effectively to enforce the statute. While I am confident that the Secretary has full powers to enforce the provisions of the bill, I would have no objection to clarifying the Secretary's powers to subpoena persons and records by an appropriate amendment to the bill." *Id.* at 1095.

The foregoing establishes, we submit, that § 521(b) was born in 1958 as a provision for *subpoena power, not immunity,* and did not change its character when incorporated into the new bill in 1959.

If, despite the language and legislative history of § 521(b), there still lingers any ambiguity as to whether the statute omitted from its incorporation the immunity provision of 15 U.S.C. § 49, that ambiguity should be resolved against immunity. The inevitability of interference with state law enforcement, the probability that automatic immunity grants may result in "immunity baths", and the general indisposition to free persons from the consequences of their crimes all counsel against a too-ready construction of any statute as granting immunity. The policy of Congress as expressed in the Landrum-Griffin Act seems specifically to preclude a construction of § 521(b) as granting

immunity. In § 604 of the Act, 73 Stat. 540 (1959), 29 U.S.C. § 524, Congress declared:

> "Nothing in this Act shall be construed to impair or diminish the authority of any state to enact and enforce general criminal laws with respect to robbery, bribery, extortion . . . [etc]."

Under this Court's holding in *Murphy* v. *Waterfront Commission*, 378 U.S. 52, 77-78, "that the constitutional privilege against self-incrimination protects . . . a federal witness against incrimination under state as well as federal law," a construction of Landrum-Griffin as incorporating an immunity provision in § 521(b) would defeat the policy expressed in § 524.[9] The obvious resolution of that intra-statutory conflict would be to give § 521(b) its natural construction as not incorporating any immunity grant.

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[9] In a letter of April 18, 1961, to the proponent of H.R. 1246, 87th Cong., 1st Sess. (1961), a bill to authorize immunity grants in legislative investigations under the commerce clause, the Attorney General stated:

> "The existing law [providing for immunity grants], of course, relates to testimony concerning attempts to endanger or overthrow the Government, a matter punishable under Federal law, and not subject to State prosecution. The broader language of H.R. 1246 would include testimony concerning a wide range of activities which are crimes under both Federal and State law, and as to which the Federal interest may be comparatively slight. Under the bill, and existing Supreme Court decisions, all such State prosecutions would be barred. Such a result would seem to be too drastic from the standpoint of a proper balance of State-Federal relations." Hearings before Subcommittee No. 5 of the Committee on the Judiciary, House of Representatives, 87th Cong., 1st Sess., Serial No. 16 (1961), p. 205.

2. Assuming *arguendo* that § 521(b) provides for immunity the course taken here by respondent amounted to misuse of the statute and invocation of the contempt power amounted to abuse of process. Respondent sought testimony from petitioner in a grand jury investigation. Petitioner declined to answer on grounds of self-incrimination. The United States Attorney, having no power to grant petitioner immunity, then invoked the powers of the Labor Department under Landrum-Griffin as a device to provide immunity so that petitioner could thereafter be compelled to answer before the grand jury. Such utilization by the Department of Justice of the Labor Department's regulatory function as a mere tool in the performance of its own prosecutive function is apparently becoming a pattern which, unless stopped by this Court, will grow even more wide-spread.[10]

Immunity provisions in regulatory statutes serve the function of facilitating the regulatory process. See *Brown* v. *Walker,* 161 U.S. 591, 610 (1896). The agencies in question need the information the witness can supply and they generally have no interest in pos-

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[10] See, e.g., *In re Certain Grand Jury Witnesses,* 211 F.Supp. 365, 366 (E.D. Mich. 1962):

> "Government counsel concedes that the witnesses were summoned by the Bureau of Labor Management Reports because the Bureau of Labor Management Reports could grant them immunity under the Landrum-Griffin Act, so that later they could be compelled to testify before a Federal Grand Jury."

See also *Wirtz* v. *Maltes, supra* note 2, in which the Department of Justice requested and received a delegation of the Secretary of Labor's investigative authority under Landrum-Griffin, thus completely eliminating the Secretary as an unnecessary middle-man. The letter of delegation in that case is reproduced, for the information of the Court, as Appendix C hereof, infra p. 11a.

sible criminal prosecutions. Concerning the immunity provision of the Federal Trade Commision Act claimed by respondent to have been incorporated in the Landrum-Griffin Act, it has been observed:

> "Since the FTC classifies all of its sanctions as remedial, there is no need for it to consider whom it should call as a witness (and, consequently, to whom it should give immunity) in terms of its own function." *The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope,* 72 Yale L.J. 1568, 1602 (1963).

To allow the immunity provision of a regulatory statute to be used by the United States Attorney for prosecutive purposes not only distorts the function of the provision, but flies in the face of the apparent unwillingness of Congress to allow immunity-grant powers to federal prosecutors. See, for example, H.R. 3021, H.R. 3024 and S. 1655, 87th Cong., 1st Sess. (1961), all sponsored by the Department of Justice, none of which passed.[11] S. 1655, which died in the House after passing the Senate, is of special interest here, because it would have given prosecutors the power to confer immunity in grand jury investigations of violations of labor laws.

In "borrowing" the immunity provisions of regulatory statutes, prosecutors assume a power even greater than that unsuccessfully sought from Congress. The various proposals for giving prosecutors immunity-grant powers have generally included such safeguards as clearance through the Attorney General. See Brownell, *Immunity From Prosecution,* 28 Tulane L. Rev. 1 (1953). The immunity provision here assumed

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[11] See also S. 16 and S. 565, 83rd Cong., 1st Sess. (1953).

to have been incorporated in § 521(b) lacks any safeguard. It automatically applies to any witness testifying under subpoena. Compare the immunity section of the Subversive Activities Control Act, 18 U.S.C. § 3486(c) (1958), which permits the United States Attorney to confer immunity as to specific matters only if (1) the witness has claimed his privilege, (2) the Attorney General has approved the grant of immunity, and (3) a District Court has ordered the witness to testify.[12]

The prosecutor's utilization of the Department of Labor in this case is analogous to use of a grand jury investigation to obtain evidence for civil litigation. Such a "shortcut to goals otherwise barred or more difficult to reach", said this Court in *United States* v. *Proctor & Gamble Co.*, 356 U.S. 677, 683, "would be flouting the policy of the law." Nor does Landrum-Griffin's provision in § 607, 73 Stat. 540, 29 U.S.C. § 527, for cooperation between agencies permit the United States Attorney to make a mere utensil out of the Department of Labor. It authorizes turnover for prosecutive purposes of evidence developed by the Secretary of Labor "in the performance of his functions . . ." and cooperation by him with another agency "in the performance of his functions . . . and the functions of . . . such [other] agency," but it necessarily presupposes that he is exercising *his* function and not merely lending out the machinery of his office.

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[12] This carefully circumscribed statute reflects what has been referred to as "today's tendency to cut down on wholesale immunity grants in the non-legislative field." Boudin, *The Immunity Bill*, 42 Geo. L.J. 497, 509 (1954). See also, Report of the New York State Law Revision Commission, N.Y. Leg. Dr. No. 65(1) (1942); N.Y. Leg. Doc. No. 65(B) (1943).

3. Petitioner's contempt adjudication was entered without notice or hearing and, therefore, violated his right to due process of law. It will presumably not be denied that due process requires that a person charged with civil contempt be given adequate notice of the charge and an opportunity to defend against it. See *Leman* v. *Krentler-Arnold Hinge Last Co.*, 284 U.S. 448; *Gompers* v. *Buck's Stove and Range Co.*, 221 U.S. 418; *Cohn* v. *Kramer*, 136 F.2d 293 (6th Cir., 1943); *Application of Tracy*, 106 F.2d 96 (2nd Cir. 1939), *cert. denied*, 308 U.S. 597; *In re Marcus*, 21 F.2d 480 (W.D. Pa. 1924); Rule 7(b)(1), F.R. Crim. P. When petitioner refused to answer the questions on July 16, 1964, he did so in the face of the July 9 order notifying him that a writ of attachment could be obtained *ex parte*, but that he would thereafter be brought before the court for a judicial proceeding. The nature of that proceeding, as described by the July 9 order, was to be "such action to enforce compliance with said subpoena as to this Court shall seem just and proper in the premises. . . ." Petitioner's only clue as to what that "action" might be was the Compliance Officer's earlier warning that he would be indicted for contempt under 15 U.S.C. § 50. In any event, petitioner had every reason to believe and no reason to doubt that he was scheduled for his day in court where he could contest any contempt charge and present all his defenses. But, whether by design or oversight on the part of the United States Attorney or the court, the *ex parte* order entered July 17 not only directed petitioner's arrest, but also finally adjudicated the contempt. The adjudication was made, moreover, on the sole basis of the affidavit of the Assistant United States Attorney asserting, without indication of source of knowledge, that petitioner had refused to answer the Compliance

Officer's questions. Because of the uniqueness of contempt proceedings, it may be true that due process requires no set format of procedure. *Blackmer* v. *United States,* 284 U.S. 421; *Howard* v. *United States,* 182 F.2d 908 (8th Cir. 1950). But the irreducible minimum of due process is (1) adequate notice, (2) an opportunity to be heard in defense, and (3) some degree of preponderance of probative evidence.[13]

Respondent's anticipated contention, made below as well, that any invalidity of the contempt adjudication growing out of its *ex parte* nature was cured by the subsequent proceeding of July 20, 1964, before Judge Palmieri, is fallacious. As shown in the Statement, *supra,* Judge Palmieri and both parties treated the order of July 17 as an adjudication of contempt and the proceeding of July 20 as an opportunity afforded petitioner to purge himself of contempt before being committed to jail. The opportunity for defense which due process required Judge Tyler to give petitioner prior to the July 17 order was not extended to peti-

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[13] Even apart from its apparent hearsay nature, the affidavit of Mr. Maloney would seem to have been an inadequate basis for a final adjudication of contempt. In *National Labor Relations Board* v. *Rath Packing Co.,* 123 F.2d 684, 685 (8th Cir. 1941), the court said:

> "It is our opinion that issues of fact affecting substantial rights should not be decided upon affidavits, if that can be avoided. . . . The weakness of accepting affidavits as evidence is well understood. It is often impossible to determine whether affiants are speaking from personal knowledge, from hearsay or from belief. . . . We think that the Board should be required to prove its charges by competent and material evidence, and that the respondent and its officers should be accorded the right to be confronted by the Board's witnesses and to cross-examine them and to adduce evidence to disprove the charge made by the Board."

tioner by Judge Palmieri. Judge Palmieri made it clear that his only function was to enter a proper commitment order unless petitioner elected to purge himself by answering the questions.

## CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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